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In the Supreme Court of the United States

OCTOBER TERM 1940.

Nos. 960 and 961.

MARVIN L. GARDNER,
Trustee in Bankruptcy of Arthur George Doethlaff,
Bankrupt,
Petitioner,

vs.

ARTHUR GEORGE DOETHLAFF,
Bankrupt,
and
PENN MUTUAL LIFE INSURANCE COMPANY,
Respondents.

BRIEF OF RESPONDENT
PENN MUTUAL LIFE INSURANCE COMPANY
In Opposition to Petition for
Writ of Certiorari.

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SUPPLEMENTAL STATEMENT OF THE CASE AND MATTERS INVOLVED.

Because the petitioner in his brief has failed to accurately state the facts and has not presented to the Court the matters involved, it becomes necessary for us to give a a short summary of the facts and the questions involved in these proceedings.

Arthur George Doethlaff filed a voluntary petition and was adjudicated a bankrupt on September 3, 1937. (R. 3.) During the entire four years immediately preceding the filing of the petition he had been unable to pay his debts in the ordinary course of his business and had been insolvent. (R. 4.)

The Bankrupt listed in his schedule of assets a $4,000 life insurance policy with The Penn Mutual Life Insurance Company. He maintained, however, in Schedule B-5 that this policy was exempt from the claim of the Trustee under Ohio General Code, Sec. 9394. (R. 4.) At the date the petition was filed the policy was payable to his wife if she survived him or if not to his son and if both predeceased him then to his estate. (R. 4.) The right to change the beneficiaries without their consent was retained by him. (R. 4.)

For the four years immediately preceding the filing of the petition the Bankrupt made premium payments on the policy in the total amount of $428.49. (R. 4.) The cash surrender value of the policy on the date of the petition was $1,286.36. (R. 4.) Included in this cash surrender value were dividend accumulations totaling $448.06 of which amount $328.88 represented actual dividends and $119.18 accrued interest thereon. (R. 5.) The Bankrupt adopted the option in the policy that the company retain the dividends and use the same to accelerate the maturity of the policy. (R. 6.) Accordingly these dividends were left to accumulate with the company and have not been withdrawn by the Bankrupt.

The Trustee filed with the Referee in Bankruptcy his amended petition and motion joining the Bankrupt and The Penn Mutual Life Insurance Company but not the beneficiaries of the policy. The Trustee maintained and both the Referee and the District Court held that the premium payments made by the Bankrupt in the four years preceding his voluntary petition in bankruptcy were payments made in fraud of creditors within the meaning of Ohio General Code, Section 9394 and should be paid over to the Trustee from the cash surrender value of the policy. (R. 24, 25, 29.)

In addition, the Referee and the District Court held that the dividends on the insurance policy and accrued in-

terest thereon were not exempt from the claims of the Trustee under the terms of Ohio General Code, Section 9394 and thus were to be paid over by the insurance company to the Trustee. (R. 24, 25, 29.)

Appeals were taken by both the Bankrupt and The Penn Mutual Life Insurance Company to the United States Circuit Court of Appeals for the Sixth Circuit. The facts of this case present the question of the proper interpretation of Ohio General Code, Section 9394, which is the Ohio statute exempting certain insurance policies from the claims of the insured's creditors.

The Circuit Court of Appeals for the Sixth Circuit held:

1. That the beneficiaries of an insurance policy are necessary parties to any action by an insured's creditors to recover allegedly fraudulently paid premiums and to recover the dividends of an insurance policy and accrued interest thereon under Ohio General Code, Section 9394.

2. That premiums paid by an insured husband on life insurance payable to his wife when he is insolvent are not paid in fraud of creditors within the meaning of Ohio General Code, Section 9394.

3. That, assuming that such premium payments are in fraud of creditors, the Trustee in Bankruptcy can not recover such from the cash surrender value of the policy but must wait until the policy matures.

4. That dividends on insurance policies and accrued interest thereon are exempt from the claims of the insured's creditors under Ohio General Code, Section 9394.

The Court further held that these matters were governed by Ohio General Code, Section 9394 but that there were no cases in Ohio passing upon the issues presented in regards to the proper interpretation of such section.

A further matter presented by the petitioner was that the appeals of the Bankrupt and the Insurance Company should be dismissed because of certain technical objections which will be discussed in full subsequently in this brief.

ARGUMENT.

The petitioner's reasons why certiorari should be granted in this case may be briefly summarized as follows:

1. The Circuit Court of Appeals committed gross error in its decision.

2. The Circuit Court of Appeals failed to search for and apply the law of Ohio to the matters presented in this case, namely, the interpretation of Ohio General Code, Section 9394.

3. That there is a conflict between the decision of this Circuit Court of Appeals and the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *In re Orear,* 178 Fed. 632.

Because this case primarily depends upon the interpretation of Ohio General Code, Section 9394, we are setting the same out in full:

> "Sec. 9394. (Exemption of proceeds from claims of creditors; exception; change of beneficiary.) All contracts of life or endowment insurance or annuities upon the life of any person, or any interest therein, which may hereafter mature, and which have been or shall be taken out for the benefit of, or made payable, by change of beneficiary, transfer or assignment to, the wife or children, or any relative dependent upon such person, or any creditor, or to a trustee for the benefit of such wife, children, dependent relative or creditor, shall be held, together with the proceeds or avails of such contracts, subject to a change of beneficiary if desired, free and clear from all claims of the creditors of such insured person or annuitants; provided, that, subject to the statute of limitations, the amount of any premium upon said contracts, endow-

ments or annuities paid in fraud of creditors, with interest thereon, shall inure to their benefit from the proceeds of the contracts, but the company issuing any such contract shall be discharged of all liability thereon by payment of its proceeds in accordance with its terms, unless, before such payment, written notice is given to it by a creditor, specifying the amount of his claim and the premiums which he alleges have been so fraudulently paid."

For purposes of clarity this portion of our brief will follow the same headings used by the petitioner in his brief.

"1. The Circuit Court of Appeals for the Sixth Circuit had no Jurisdiction in either of these Appeals."

The petitioner maintains that the Circuit Court of Appeals had no jurisdiction in the appeal of the Bankrupt for the reason that his appeal was not filed or docketed in the Circuit Court of Appeals within the time required by law.

The facts respecting the Bankrupt's appeal are as follows: On May 12, 1939 the District Court entered its judgment confirming the order of the Referee. On June 1, 1939 the Bankrupt filed his notice of appeal. On July 7, 1939, the transcript of record was filed with the United States Circuit Court of Appeals. The attorney for the Bankrupt did not deposit $45 for costs within the time required by the Rules of the Circuit Court of Appeals. However, the Bankrupt did file an application to proceed in *forma pauperis,* which was granted. This relieved the Bankrupt of the duty of depositing $45 for costs and permitted the Circuit Court of Appeals to docket the case.

The Federal Rules of Civil Procedure provide in Rule 73(a) as follows:

"Appeal to a Circuit Court of Appeals.

"(a) *How Taken.* When an appeal is permitted by law from a district court to a circuit court of ap-

peals and within the time prescribed, a party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal."

Under the above rule the fact that the appellant did not file $45 for costs within the time set forth in the rules, can and does not affect the validity of his appeal. The petitioner maintains that under the rules of the Circuit Court of Appeals for the Sixth Circuit and under the Federal Rules of Civil Procedure, the Court may enlarge the time for docketing an appeal if such enlargement is granted prior to the expiration date. However, both of these rules refer to enlargement of the time for docketing an appeal by the *District Court*. Neither rule contains any restriction whatsoever on the Circuit Court of Appeals extending the time for docketing an appeal. Therefore, the Circuit Court was well within its rights in docketing the appeal of the Bankrupt. Needless to say, the fact that the Bankrupt could not deposit the $45 within the time required is, at the most, a very technical objection.

As respects the appeal of The Penn Mutual Life Insurance Company the Circuit Court correctly held that there was no need to pass upon its validity as long as the case was before it on the appeal of the Bankrupt. Both the appeal of the Bankrupt and the Insurance Company were from the same judgment and were based upon the same grounds.

The Trustee maintained that the appeal of the Insurance Company was invalid because the Insurance Company had failed to file a petition for review of the Referee's order with the District Court. The cases cited by the Trustee in support of this merely hold that if no petition for

review is filed to a Referee's order, such order becomes final and cannot be collaterally attacked. We have no argument with this rule. The fact is that the Bankrupt filed a petition for review of the Referee's order and thus gave the District Court jurisdiction to pass upon the Referee's order. Once the District Court had jurisdiction and, pursuant thereto, issued its order, the Insurance Company had a valid right to appeal to the Circuit Court of Appeals from such order. The cases cited by the petitioner clearly show that the petition for review is only necessary to give the District Court jurisdiction to pass upon the Referee's order.

"2. Error in Failing to Search for and Apply the Law of Ohio."

Petitioner cites on pages 15, 16 and 17 of his brief the latest cases of the Supreme Court which hold that the parties and the Federal Courts must search for and apply the substantive law governing an identical action in the state courts if the matter presented is one of state law. This is precisely what the Circuit Court of Appeals did in this case by holding that the issues presented were governed by O. G. C. Sec. 9394. However, as the Circuit Court stated, there are no cases in Ohio which have passed upon the matters presented in this case, namely, the proper interpretation of Ohio General Code, Section 9394. For this reason the Circuit Court was forced to determine what was the proper interpretation of such section.

"3. Error in Holding that the Beneficiaries Named in the Policies were Necessary Parties in this Proceeding."

The Circuit Court of Appeals stated that the beneficiaries of the policy should have been made parties because they had a vital interest adverse to the claim of the Trustee. The Circuit Court, however, did not reverse the case

on this point. There is no case in Ohio which passes upon this point one way or the other. All of the Ohio State Supreme Court cases cited by the petitioner merely hold that the beneficiary of an insurance policy, where the insured has reserved the right to change the beneficiary, does not have a vested right in such policy until the insured dies. With this proposition we entirely agree. However, the result of the Referee's and the District Court's order was to force the insured to surrender the policy, thus defeating the interests of the beneficiaries in the policy, which clearly affects their interest whether such is contingent or vested. The only case anywhere which we have been able to find passing upon this precise point is *In re Siegel* (U. S. D. C. S. D. N. Y., 1936) C. C. H. Bankruptcy Law Service, Decisions 1934-36, Par. 3967 which clearly supports the Circuit Court's decision.

"4. Error in Charge by Interpreting the Words 'Paid in Fraud of Creditors' to 'Paid with Intent to Delay, Hinder and Defraud Them.' "

The issue presented to the Circuit Court of Appeals was whether premium payments made by an insured when insolvent are in fraud of creditors within the meaning of Ohio General Code, Section 9394. The only evidence presented by the Trustee was that the insured was insolvent when he made premium payments totaling $428.29 over a four year period.

The Circuit Court held that there were no cases in Ohio passing upon the question of whether such premiums payments under those circumstances were in fraud of creditors within the meaning of Ohio General Code, Section 9394. The petitioner maintains that there are cases in Ohio passing upon this point and cites the case of *Lytle v. Baldinger*, 84 O. S. 1. The Syllabus of this case, which is the law in Ohio, reads as follows:

"1. A petition to set aside a fraudulent sale or transfer made in violation of the provisions of Section 6343, Revised Statutes, which does not aver that the person to whom the sale, conveyance, transfer, mortgage or assignment is made knew at the time of the transaction of the fraudulent intent on the part of the debtor does not state facts sufficient to constitute a cause of action.

"2. A transfer by an insolvent husband to his wife of a policy of insurance then in force on the life of the husband is not an assignment of property in fraud of creditors or to hinder or delay creditors within the contemplation of Section 6343, Revised Statutes.

"3. In such case the only remedy of the creditor is found in the provisions of Section 3628, Revised Statutes."

It is to be noted that this case involved the assignment of an insurance policy by a husband to his wife and whether such assignment was fraudulent or not because at the time of such assignment the husband was insolvent, the Court held that such assignment was not fraudulent. The Court held that the only remedy of the creditor was under the statute then in existence which is similar to Ohio General Code, Sec. 9394.

The next case cited by the petitioner is *Marlow, Trustee v. Gillen,* 132 O. S. 102. In this case the debtor, within three months of filing his petition in bankruptcy, conveyed all of his property which consisted of realty worth $3,000 to a third party for an actual consideration of $1250. The Court held that this conveyance was in fraud of creditors and that the Trustee under Section 67e of the National Bankruptcy Act could recover back the property because it was a fraudulent transfer within four months of the filing of the petition in bankruptcy. It is interesting to note that the Trustee has never cited this case until his present brief. Needless to say it is no authority one way or the other, for the question presented to the Circuit Court of Appeals.

The next case cited is *Union Central Life Insurance Co. v. Eckert,* (1878) 5 O. D. Rep. 528. This case was not cited to the Referee, to the District Court or to the Circuit Court of Appeals by the petitioner. This case dealt with a statute of Ohio which provided that insurance policies payable to the wife of the insured should be free from the claims of the insured's creditors "provided, however, that if such policies are procured by any person with intent to defraud his creditors, an amount equal to the premium paid on such policy or policies, with interest, shall inure to the benefit of said creditors * * *," (69 O. L. 159), which statute no longer is in effect in Ohio. This case involved the situation where a husband, while insolvent, took out a life insurance policy payable to his wife. This is a great deal different from the question presented in our case, because the insured bankrupt was not insolvent when the policy was taken out. He merely made certain premium payments after he had become insolvent.

The net effect of the Circuit Court's decision is that premiums paid by a husband for life insurance payable to his wife are not in fraud of creditors because of the mere fact that the husband is insolvent at the time of making the premium payments in the absence of other facts. There is no Ohio case respecting Ohio General Code, Section 9394, which passes upon this point one way or the other. None of the cases cited by petitioner have any bearing upon this issue. For this reason the Circuit Court of Appeals had to determine the question itself and decided that other evidence was necessary before it should be held as a matter of law that premiums paid by an insolvent husband were in fraud of creditors within the meaning of Ohio General Code, Section 9394.

"5. Error in Finding as to Cash Surrender Value of Policy."

For the first time the Trustee in Bankruptcy states that he is not interested in obtaining the so-called fraudulently paid premiums, dividends and interest thereon, from the cash surrender value of the policy. He states that his claim is that the powers of the Bankrupt as respects the insurance policy pass to him by operation of law. It is quite evident that the rights of the Trustee are governed by Ohio General Code, Section 9394. The insurance policy is exempt from the claims of the Trustee except such as are given to him by this section.

There are no funds on hand with the Insurance Company to the credit of the insured. As we will hereafter show, the dividends and accumulated interest thereon are exempt under Ohio General Code, Section 9394 and the Trustee only has a claim for the premiums paid during the past four years, if such premiums were paid in fraud of creditors. Under Ohio General Code, Section 9394 the Trustee can only receive these from the proceeds of the policy which means the amounts payable at the maturity of the policy as a death claim or the amounts payable if the policy is voluntarily surrendered by the insured.

In the Trustee's Amended Petition which was filed with the Referee, paragraph 3 reads:

> "3. Your Trustee further says that there is a cash surrender value of One Thousand Two Hundred Ninety-nine and 48/100 Dollars ($1,299.48), of which Four Hundred Fifty-seven and 97/100 Dollars ($457.97) rightfully belongs to your Trustee. That the above amount of money, the total sum of Four Hundred Fifty-seven and 97/100 Dollars ($457.97) was paid by the Bankrupt as premiums to the Penn Mutual Life Insurance Company while he was in the state of insolvency, continuously prior to the filing of the Petition herein by the Bankrupt."

The Referee, in holding for the Trustee, stated as one of the conclusions of the law (R. 24):

> "(1) That on motion for a show cause order directing payment of cash surrender value of life policy to trustee, because premiums were paid in fraud of creditors, premiums which have been paid while bankrupt was insolvent are to be regarded as fraudulent and so much of the cash surrender value and dividends as was traceable to those premiums with interest thereon is legally the property of the bankrupt estate."

The District Court confirmed the order of the Referee. It is clear from the above statements that the Trustee, the Referee and the District Court considered that the claims of the Trustee and the order of the Referee and District Court were that the so-called fraudulently paid premiums were to be paid out of the cash surrender value of the policy.

To say that the Circuit Court of Appeals rendered its opinion without accurate knowledge as to what the claims of the Trustee were is clearly contrary to the record of this case. We are pointing this out not because it is important but merely so that the Court will have the facts as shown by the record before it.

The Circuit Court held that under Ohio General Code, Section 9394, fraudulently paid premiums could only be recovered when the policy matured. The only Ohio case passing upon this point, which case supports the Circuit Court, is *Deal v. Menke*, 29 O. L. A. 181 (1939). The Circuit Court cited the case of *Greiman v. Metropolitan Life Insurance Co., et al.*, 96 F. (2d) 823 (C. C. A., 3, 1938) cert. den. 305 U. S. 606, which case is precisely in point on this issue.

"6. Error in Holding 'that the Premiums Accumulating Dividends and Interest should not go to the Trustee'."

We are somewhat at a loss to understand the position of the petitioner in this portion of his brief. The Trustee cites Section 70 of the Bankruptcy Act and the case of *Cohen, Trustee in Bankruptcy v. Samuels* (1917), 245 U. S. 50. It is obvious that neither this section nor the case have any bearing upon the issues presented here. It is clear that if Ohio did not have the exemption statute of Ohio General Code, Section 9394, the Trustee would be entitled to the full cash surrender value of the policy under both Section 70 of the Bankruptcy Act and the *Cohen* case above cited.

The Trustee's rights are governed entirely by Ohio General Code, Section 9394. The issue is whether the Trustee is entitled to the premiums paid when the bankrupt was insolvent. The Circuit Court of Appeals held that these premium payments were not in fraud of creditors within the meaning of Ohio General Code, Section 9394. In support of this proposition it cited *Central Bank of Washington v. Hume,* 128 U. S. 195 and *Ross v. Minneapolis Mutual Life Insurance Co.,* 154 Minn. 186, 191 N. W. 428, 31 A. L. R. 46. Both of these cases are precisely in point because they hold that an insured who is insolvent may devote a reasonable portion of his income to the payment of premiums on life insurance payable to his wife without such payments being in fraud of creditors.

The Petitioner next claims that the case of *In re Orear,* 178 Fed. 632, is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit. At pages 25 and 26 of his brief, the petitioner purports to quote extensively from the Court's opinion in the *In re Orear* case at 178 Fed. 638. An analysis of this purported quotation shows that it actually is the Syllabus of the case combined with a portion of the opinion in the case at page 635, which por-

tion is further combined with a portion of the Syllabus of an entirely different case, namely *Central Bank of Washington v. Hume, supra.* This entire combination appears to be a quotation from the decision of the Court in the *In re Orear* case.

The case itself has no bearing upon the issues presented in our case. The *In re Orear* case merely held that where a bankrupt held an insurance policy in which he reserved the right to change the beneficiary, such passes under Section 70 of the Bankruptcy Act to the Trustee in Bankruptcy in spite of the fact that the insurance policies at the date of bankruptcy did not have a cash surrender value. The question of whether these policies were exempt under the Missouri exemption statute was not before the Court as is shown in the *Orear* decision at 178 Fed. 632 at 636, which reads:

> "Whether or not policy No. 656496, which is expressed therein to be for the benefit of the wife of the insured, is to be regarded as exempt under section 7895, Rev. St. Mo. 1899 (Ann. St. 1906, p. 3749), and whether or not anything has occurred to avoid an exemption of the policy under that statute, are questions which were not in any manner presented before the referee or the District Court, and have not been presented in this court; so we leave them undecided."

Thus it is clear that the Court did not have the Missouri exemption statute before it. In addition, the question of fraudulently paid premiums was not presented in the case. The last case cited by the petitioner is *Union Central Life Insurance Co. v. Eckert,* 5 O. D. Rep. 528. We have heretofore discussed this case and shown that it had no bearing upon the issues presented in our case.

The Circuit Court further held that under Ohio General Code, Section 9394, the accumulated dividends and the accrued interest thereon were exempt from the claims of the Trustee. There are no cases in Ohio on this point one

way or the other. In support of its opinion the Circuit Court cited *In re Keil*, 88 F. (2d) 7 (C. C. A. 2, 1937), cert. den. 301 U. S. 708, which case is precisely in point on this issue.

"7. Error in not Applying the Exemption Laws of Ohio."

The discussion of the petitioner under this heading is both irrelevant and misleading for the reason that Ohio General Code, Section 11738, has nothing whatsoever to do with this case. The exemption statute which the Circuit Court of Appeals construed and which statute is the only one that has any bearing upon this case is Ohio General Code, Section 9394, which exempts certain insurance policies from the claims of the insured's creditors.

Ohio General Code, Section 11738, is that section of the Ohio General Code which exempts certain real and personal property of debtors from levy on execution where such debtor has no homestead property. Such section has nothing whatsoever to do with insurance policies. Neither the Bankrupt nor The Penn Mutual Life Insurance Company have claimed that this statute exempted the insurance policy from the claims of the Trustee in Bankruptcy.

"8. Error in Holding that the Last Premium Payment to the Insurance Company was the Property of the Bankrupt."

In this portion of the brief the Trustee claims that the last premium payment made on June 8, 1937 should be recovered under Section 67e of the Bankruptcy Act because it was made within four months prior to the bankruptcy. Nowhere in the briefs has this section been mentioned prior to this time and no mention of it was made in the oral argument before the Circuit Court of Appeals.

The petitioner in quoting Section 67e of the Bankruptcy Act, 11 U. S. C. A. 107(e), leaves out the following portion of said section:

"* * * except as to purchasers in good faith and for a present fair consideration; * * *."

There is no question that The Penn Mutual Life Insurance Company had no knowledge when it received the last premium payment whether the insured was insolvent or not. The Insurance Company clearly was a purchaser in good faith. It was required to accept this premium payment from the insured under the terms of the insurance policy. As consideration for the receipt of the premium payment, the Insurance Company maintained and kept in full force and effect the insurance policy until the next premium payment was due. In addition, dividends were allowed by the Insurance Company on this premium. A case clearly holding that in such situations insurance companies are purchasers in good faith is *Mutual Life Insurance Co. v. Smith* (C. C. A. Mass., 1911) 184 Fed. 1.

In addition, there is no evidence in the record to support the proposition that the insured paid this last premium payment with actual intent to defraud his creditors. Under the quoted portion of 67e of the Bankruptcy Act actual intent is required before the Trustee can set aside a transfer within four months of the petition being filed in bankruptcy.

On page 32 of his brief the petitioner maintains that he held a lien upon the money in the hands of the Insurance Company, which the Bankrupt himself could only withdraw. However, the rights of the Trustee in the insurance policy are governed and restricted by Ohio General Code, Section 9394. As we have heretofore shown and as the Circuit Court of Appeals held, the Trustee has no right or lien on any of the proceeds of this insurance policy.

CONCLUSION.

The only point in issue at this time is whether this Court should grant certiorari or not. Certiorari should not be granted in this case because:

1. The Circuit Court did not commit error in its decision.

2. The Circuit Court did follow the mandate of this Court that it should apply the law of Ohio, by applying Ohio General Code Section 9394. There being no cases in Ohio interpreting this section the Court was forced to determine the proper interpretation itself.

3. There is no conflict between the decision of the Circuit Court of Appeals for the Sixth Circuit in this case and the decision of any other Circuit Court of Appeals. In fact the opinion of the Circuit Court of Appeals in this case is in complete conformity with two decisions of other Circuit Courts in both of which certiorari was denied, *Greiman v. Metropolitan Life Insurance Co., supra,* and *In re Keil, supra.*

Therefore, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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